



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

THE
AMERICAN LAW REGISTER.

APRIL, 1862.

THE JURISDICTION OF THE COURT OF CHANCERY
TO ENFORCE CHARITABLE USES.

(CONTINUED.)

In the January number of this magazine, we had discussed the power of Chancery to enforce a will created upon a feoffment to uses. We had shown that wills were made in this manner from an early date, that they could, in the reign of E. IV., be enforced not only against the feoffee but against his heirs, and that Lord Bacon's statement to the contrary could not be relied upon as accurate.¹ It was also shown that if land was ordered to be sold, the ordinary or court of probate had nothing to do with the will, but that the direction could be carried into effect only by the Court of Chancery. The conclusion was arrived at that every use named in a will, based upon a feoffment to uses, could be established in that Court. The subject of a trust created upon a will of land made under the custom of London and other localities remained

¹ Additional authorities to those then cited are the following: Fitz. Abr. tit. Subpoena, pl. 8, 14; a case is there cited from 14 E. IV., directly deciding the point. It is also said by the Lord Chancellor in the Year Book, 22 E. IV., that there were then records in chancery, in which a suit had been brought against the heir of the feoffee. The case in Fitzherbert is also cited under the title "Age."

to be examined, as introductory to the discussion of the "uses" which could be enforced under the title of "charities."

By the custom of London, land could be devised from the earliest period. The power of its citizens to make wills undoubtedly was a relic of Saxon jurisprudence. The devise could be made by any owner of land, whether a citizen or not, and was as the reporter in the Year Book, 11 H. VII., 2, expresses it, an incident to the land. The devise was in the nature of a conveyance, and a charitable gift would have been obnoxious to the statutes of mortmain,¹ had it not been for an express rule extending only to *freemen of the city*, allowing a devise to be made in that manner.

These wills were largely made for charitable purposes of various kinds. It was common to give power to executors or other persons to sell land, and to appropriate the money to charitable uses. This was probably done in many cases to evade the statutes of mortmain where those were applicable. The devise was either that the executors should sell the land, or of the land to be sold by the executors. The transfer of any *legal* interest *in the land itself* tending to a perpetuity was, in general, contrary to the policy of the law. Thus in 40 Ass. (Ed. III.) 26, a devise of land having been made to H. C. and his heirs forever to pay annually twelve marks to provide two chaplains to sing forever for the soul of the deceased, it was held to be within the mortmain act as being in the nature of a perpetual *rent-charge*, while a provision in the same instrument to pay a certain annual sum to the rector was not illegal. The ordinary or bishop had nothing to do with a will of this kind, so far as it concerned real estate. It was strictly a conveyance. In the city of London it was necessary that the will should be proclaimed and enrolled at Guildhall. The fact of enrolment might be certified by the mayor or recorder of the city to any court where a question concerning its validity arose. "All the testaments by which any tenements are devised may be enrolled in the Hustings of Record,

¹ The mortmain acts were first passed in the reign of Henry III. 9 id. 36, and in subsequent reigns to the time of Richard II. Their object was to prevent certain corporations from acquiring real estate.

at the suit of any who may take advantage by the same testaments, and the testaments which are so to be enrolled shall be brought, or caused to be shown before the mayor and aldermen in full Hustings, and there the said will shall be enrolled by the sergeant, and then proved by two honest men well known, which shall be sworn and examined severally of all the circumstances of the said will, and of the estate of the testator and of his seal, and if the proofs be found good and true and agreeing, then shall the same will be enrolled upon record in the same Hustings."¹

In some localities the proceeding was not so formal.²

It was also the custom in London to require the executors of such a will to find sureties for the faithful performance of the trust, or in default thereof to be committed to jail!³

The remedy for the failure to fulfil the charitable duties imposed upon an executor under such a will, was very imperfect before the jurisdiction of chancery was thoroughly established. The heir could enter upon the executor, if he was in possession and was unwilling to perform the will of the deceased. This could be done only when the alms had not been distributed for two years, and if the executor performed his duty before judgment he would retain the land.⁴

What the precise remedy, before the rise of the Court of Chancery, was in case the land was actually sold, and the money was not devoted to the designated object, is not clear. In one case, an

¹ Ancient Usages and Customs of London, p. 157, bound with Calthrop's Reports, London, 1655.

² As indicating the broad distinction, in respect to probate, between *all* wills of real estate and of personal property, it may be noticed that separate wills disposing of the different estates were made at the same time referring to each other. Two of these, which contained so many of the seeds of litigation that no lawyer could pick them out, were construed by statute 21 H. VIII., 310. The wills are given at length in 3 Statutes of the Realm, 310, &c.

³ If a devisee was kept out of possession, he was entitled to a writ of "ex gravi querela," which was like a writ of right at common law.

⁴ Liber Assisarum, 39 E. III. p. 236, pl. 17; Statutes 13 E. I. c. 41; 6 E. I. c. 4. There is here an element of equity, as in the case of a tenant who does not pay rent, and who brings the amount into court before judgment.

action of debt was brought against such an executor for the proceeds. It might, perhaps, be urged that the money became assets after the sale, and was to be controlled by the ordinary. Such a claim by the ordinary would have been an usurpation. The statute of 21 H. VIII., ch. 5, sec. 3, is directly opposed to it. "If the person deceased will by his last will and testament any lands, tenements or hereditaments to be sold, the money thereof coming, nor the profits of the said land for any time to be taken shall not be accounted as any of the goods or chattels of the said person so deceased." This statute, which seems also applicable to wills made by feoffments to uses, was drawn by Sir Francis More, then Lord Chancellor.¹ It cannot be supposed that in a statute intended for redress of abuses an undisputed right was taken away from the ordinary. This doctrine was confirmed in the fourth and fifth years of the reign of Philip and Mary. It was then held that the Ecclesiastical Court had nothing to do with the money arising from a sale of land.² So it was said at a later period, that "the ordinary could not meddle with money produced on a sale of land. Courts Christian cannot hold plea of a legacy in equity. The money *must be sued for in a Court of Equity.*"³ If a feoffee to uses sold the land, retaining the money, and died, *his executor* could be compelled in Chancery to pay it. This was decided in the reign of Henry VI. It is thus shown that from the earliest period, decrees in Chancery could be made against executors upon the footing of a trust.⁴

Having thus ascertained that the bishop or ordinary was not concerned in any form in probate of wills of land or in enforcing their execution, our next inquiry is, as to the fact whether a trust could be created in a common law or customary will. It would seem that

¹ 1 Campbell's Lord Chancellors, p. 442.

² Benloe's Rep. 21.

³ Edwards *vs.* Graves, Hobart R. 265.

⁴ Moor. 552, said by Egerton, Ld. Ch., to be found in a record in 34 H. VI. "Egerton vouched a case of which he had a copy out of the Tower that a feoffee to uses, sold the land and died, and it was decreed, *in Chancery*, by the advice of all the Judges in England, that the cestui que use should have the money from the executors of the feoffee." Robcs *vs.* Bent., Moor R. 552.

no doubt could be entertained upon general principles, because the devise operated as a conveyance without the necessity of livery of seisin. The executors, when they had an estate in the land, were clearly trustees, or in the nature of feoffees to uses. Charitable uses must have been created in this way, and, as trusts, were not obnoxious to the mortmain acts, unless given to *corporations*. In fact one of the objects of the statute of wills, passed in the reign of H. VIII., was to facilitate devises to charitable uses. Thus, in that section of the statute which allowed land to be devised for the preferment of a wife, the payment of debts and *otherwise*, it was held by the Court that the word "otherwise" was to be applied to charities.¹

But there is direct proof that a trust could be created upon a customary will at an early period. A case involving this question was decided in 30 H. VI. in the Exchequer Chamber. It was stated to the Court of Exchequer that a citizen of London, by his testament, enrolled at the Hustings of London, had devised certain tenements within the city to his son and three others, in fee, and his will was, that one of the three should have all the profit of the said land during his life. Now, he who had the profit was dead, and the heir brought his bill in Chancery, complaining that the said devise was *in trust*, and prayed that the others should release to him, &c. It was urged by the defendants that, as by his testament the testator had devised the lands in fee to the four, and by the same devise, it was his will that one should have the profits during his life, it sufficiently appeared that the others were to have the fee, and that the case was not like a feoffment in which no will was expressed. Fortescue, J., said: "I know no difference between a feoffment and a devise as to this point, so that if you do not deny that it is a case of trust, there is reason that you should release to the heir," and this all the judges conceded.² This case is valuable, as showing that the court did, contemporaneously with the earliest recorded decisions upon wills made upon feoffments to uses, hold the same rules applicable to devises made according to custom.

¹ Crompton on the Jurisprudence of the Courts. The reference has been mislaid.

² Statham Abridgment, tit. Devise, Ed. 1470.

In the reign of Henry VIII. lands were made devisable by statute.

The principles applicable to customary wills were at once extended to wills made under this act. Probate before the ecclesiastical judge was unnecessary. In fact, this new law made common to England a power which had previously existed in certain sections of the country. There can be no doubt that if the statute of wills had been passed before the statute of uses, instead of after that period, land could have been given in that method to uses as well as by feoffment. Most of the principles of the common law, respecting wills of land, had been deduced by the judges long before the statute of H. VIII. For nearly five hundred years questions of that kind had come before the courts, and the Year Books are full of decisions enunciating the well-settled rules of law upon the subject of devises.

Having thus ascertained that a customary or statutory will could be made as well as a feoffment in such a manner as to create a use, we may examine the application of this subject to the law of *charities*.

It seems entirely clear that a use for charitable purposes would be enforced whenever the object was definite. If a use was declared to a definite person or persons, they could demand, in a Court of Chancery, that the direction should be carried into effect. Thus, it was said in the Year Book 15 H. VII. 12, if the will was that the feoffees themselves, or the executors, shall sell the land to J. S., now J. S. can, *in Chancery*, compel a sale to him.¹ The term "J. S." is put as the broadest possible expression to denote that the sale can be demanded by any one to whom the use is given, for it had been previously stated that *creditors* could compel a sale which had been directed for their benefit. Again, if the land had been given to definite persons for the use of an indefinite body, as for example, to feoffees for the use of the poor, it seems beyond dispute that such persons could, in Equity, take the property, and hold it for the charitable purpose.

It may be admitted, at the outset, that the rule at law was other-

¹ Crompton, Jurisdiction of the Courts, title Chancery, p. 54, Ed. 1637.

wise. No direct gift could be made to an unincorporated body. One of the earliest cases in which this question was discussed at law, was that of the Whitawyers.¹ A devise was made under the custom of London, to two of the best men of the Guild or Fraternity of Whitawyers for ever, to find a chaplain to sing for the soul of the testator. The devise was not contrary to the mortmain law, and the only question was as to its legal validity, the Guild being an unincorporated association. The question came up before the court on a claim that the land had escheated to the king, the testator having died without heirs. This was, of course, a pure legal question. It was evident that this devise was void for uncertainty as a patent ambiguity, unless the theory of the counsel for the fraternity could prevail, which was that the "Whitawyers" must take as "an association," and that their wardens might be treated as the "two best men." The whole argument turned upon the question, whether an unincorporated body could take land for such a purpose? The court held that it could not, and that the land had escheated to the king. Knivet, Chancellor, said: "It cannot be by the law that this community, which has no charter from the king, can be adjudged a body to purchase an estate of land."

This case decides no more than that a direct conveyance of land cannot be made to an unincorporated body.

Could a use be given by the rules of equity to such a body either for its own sake, or to hold for others?

It would appear at first thought, upon principle, that it could not. Though a use was not recognised in a court of law, yet, in equity, it had many of the qualities of real estate,² and was descendible to the heir of the owner. One of its essential elements, in general, was that the beneficiary or cestui que use could call upon the legal owner to make a title. If a use in land were given to an unincorporated association, the feoffees evidently could not convey to the unincorporated body, because they were not able to hold

¹ Year Book 49 E. III. 3.

² A use followed the nature of the land. In cases of Gavelkind, children took the use equally by descent; in borough English, the youngest inherited: Year Book 14 H. VIII. 6.

land. The anomaly would then be introduced of a *cestui que use* who had not the capacity to acquire the legal title. This view, however, is not decisive, both because there always were uses which could not be turned into legal estates, and because the court may have established different rules in regard to charities from those which prevailed in other cases. The question must, therefore, be solved simply upon the authorities.

A very important case upon this subject will be found in the Year Book 12 H. VII., pages 27, 28, 29. This case is to be particularly noticed for two reasons, *first*, as showing what the view of the *Law Courts* was as to the power of an unincorporated body to take a use, and *second*, as proving that *a parish could not, in general, be regarded as a body capable of holding land*. If a corporation at all, it was only such *sub modo*, and not for this purpose.

In the case in question, land had been given to a parson for the use of the parishioners of a certain parish. This was after the statute of Richard III., c. 1,¹ which allowed the *cestui que use* to make a conveyance as owner. The churchwardens assumed to make a lease of the land, and the question was, whether the lease was valid. It will be observed that two points arose; one was whether the parishioners could take a use, and the other was whether the churchwardens could act for them. Although the case came up in a court of law, it was necessary to decide whether the gift was so far valid in *equity*, that the statute of Richard might operate upon it. As this case has not been cited in the recent arguments upon this subject, it will be noticed at some length. The counsel opposed to the parishioners urged that they were not a corporation, and had no capacity to take. On the other hand, it was said that the fee simple was in the feoffee, and that the right of the parishioners was only a use or matter in equity, and consequently valid. Frowicke, J., said that it was necessary to have a person competent to accept the gift, and this could be in two methods:

¹ It is said in one place that before this statute, a will of land made by *cestui que use* was not good, save that the feoffee of his own will could act accordingly. This, however, must have referred to validity *at law*, (see context,) Year Book 19 H. VIIIL 10; 14 H. VIII. 7.

either by a known name of inheritance, or by a corporate name. Rede, J.—“In my opinion, this is a void use. The parishioners have no capacity. If a feoffment should be made to the use of a fellowship of a given city, it would be void.” Distinctions were taken between the Guilds and fellowships of London, which were corporations, and unincorporated societies. Fineux, C. J., distinguished between certain gifts of *personal property* which the parishioners were bound by law to acquire, and were therefore capable of holding, and uses in land which they could not acquire. Crompton, an accurate writer, cites this case for the proposition that parishioners could not take either at law or in equity, and that the land was held to the use of the feoffor.¹ It was only necessary to decide, however, that it was not *such* a use as would entitle the *cestui que use* under the statute to make a conveyance as owner.

The same general proposition has been thought by some to be indicated in the Year Book 15 H. VII., p. 12. It is there said by all the Justices, that although if land were ordered to be sold under a will created by a feoffment to uses, and the proceeds directed to be paid to J. S., the latter person could compel the sale to be made in chancery; yet if his will is that his feoffees shall alien his land to obtain money, *to distribute, &c.*, that now no one can compel them to make alienation, because no one is *damaged* for want of alienation. The words “*to distribute, &c.*,” usually mean, in the Year Books, to distribute for the soul of the deceased. Too much stress should not, however, be laid upon this passage. Though the language might have included charitable gifts, yet the reason given is not apt. The Judge (Fineux) would have said that the *want of capacity* was the reason why the direction should not be enforced, as he had argued *that* question but a short time before in the case already cited. The language should be confined to gifts for saying prayers for the soul of the deceased, and other like provisions, and then the reason that no person is damaged is applicable. No proceeding could be instituted in behalf of the deceased. Besides, if the words “*to distribute, &c.*,” are extended

¹ *Jurisd. of Courts*, 1594.

to *all* charitable gifts, the statement was incorrect, for some uses, not indefinite, could certainly be enforced in chancery.

The decision in 12 H. VII., p. 27, however, is clear to the point, and if there were no opposing authorities, based, perhaps, upon peculiar rules concerning charities, it might be thought decisive. Opinions of the early Justices of the common law courts, upon chancery questions against chancery jurisdiction, must be received with caution. They were jealous, in many cases, of the growing power of the Chancellors. It must be presumed that, in many cases, they did not understand the subject. Lord Bacon, with his rare sagacity, had a clear insight into this point. Says he, in an address to the committees of conference in the Lords and Commons: "The law of England is not insociable, but is advised by other sciences; in words, by grammarians; in matrimony, by civilians; in minerals, by natural philosophers; in *uses*, by *moral philosophers*."¹ The reporter in the Year Books, in one instance, candidly admits his defective knowledge.² "A good point was made by Vavisor, J., but I did not understand the case well. Marrow, of the Temple, knew it well, for he was counsel." There seems to be an implication here that a lawyer must have been counsel to understand an equity case. The ignorance was doubtless found in others who were not so candid. The common law Judges had at this time little occasion to study the theory of uses. They steadily ignored them in their system of jurisprudence. The "moral philosophers" of that day must have been the clerical chancellors, and as a general rule, their opinions upon equity cases must have prevailed.

Having stated the authorities opposed to the enforcement of uses for an indefinite body, the following suggestions are presented in favor of upholding them:

1. Gifts of a charitable nature prevailed from an early period. One of the earliest known instances is found in Sir John Philpot's will, once Lord Mayor of London, (anno 1381.) The phraseology of this early charity may be reproduced. It consisted of a reve-

¹ Moore R. 791.

² It is not, perhaps, generally known, that a very considerable number of equity cases are to be found in the Year Books, interpersed with the decisions at law.

ne issuing from land. "I give to five poor men, in honor of the five wounds of Jesus Christ, and to five impotent and poor women, in honor of the five joys of the Virgin Mary, one penny each per day." The amount was to be paid by his wife, and the beneficiaries selected by her while she lived. After her death the trust was to be administered by the Mayor of the city for the time being. It is now managed by the City of London, with about twenty other similar charities.¹ From that time the reports of the English Commissioners of Charities are full of instances where individuals held property, both real and personal, under such directions, for a century or more before the statute of Elizabeth. These were often foundations in the sense of the Roman law, feoffees being directed to keep up their number by new conveyances, as it was diminished through death and other causes. Thus, in the parish of Great Dunmow, a trust was created in 17th Richard II. (1394,) by a conveyance to feoffees, who continued their number through intermediate conveyances for more than two hundred years. It is very difficult to suppose that gifts of this kind, existing by succession until the present day, scores of which, before 1600, were found in every county of England, remained from one to two hundred years without legal enforcement.²

2. The statute law, in a number of instances, indicates the existence and enforcement of charitable uses, provides more perfect means of redress, or restrains their operation and effect. No hint is to be found anywhere, that they are less valid than other uses. Thus, in the second year of the reign of Henry V. (1414,) it is recited in a statute that hospitals had been founded by the King, lords and ladies, as by others of divers estates, to the honor of God, *in aid and merit of the souls of the founders* who have given a great part of their movable goods for the building of the same, and a great part of their lands to sustain impotent men, lazars, men

¹ A list of these will be found in the Analytical Digest of the reports of the Commissioners of Charities.

² 29th Report of Commissioners of Charities, p. 176. More than fifty cases of the same kind are found in this one report, the charities having been created before 1600.

out of their wits, poor women with child, and to nourish, relieve or refresh other poor people. These had decayed, and the funds had been withdrawn by divers persons to other uses. It was provided that, as to the foundations of the King, the ordinaries, by commission, should inquire and certify their inquisitions into chancery; and as to other hospitals, which are of another foundation and patronage than of the King, the ordinary shall not only inquire of the manner of foundation, estate and governance of the same, but also correct and reform them. This power of visitation is quite analogous to that of the Roman law—every *manner of foundation* is included. Stat. 2 H. V., c. i. So in 21 H. VIII., c. 4, the legislature remedy a defect in the law occasioned by the refusal of some one or more of the executors to act upon a will made through feoffments to uses. The opinion had become prevalent, that if executors were, under such circumstances, ordered to sell lands, the trust or direction could not be enforced. This doubt arose as to *all* directions of this kind, and the grouping of the different objects for which such sales might be made is instructive. “Whereas divers sundry persons, before this time, having other persons seised to their uses, of and in land and other hereditaments, to and for the declaration of their wills, have, by their last wills and testaments, willed and declared such land to be sold by their executors, as well to and for the payment of their debts, performance of their legacies, necessary and convenient finding of their wives, virtuous bringing up and advancement of their children to marriage, as also for *other charitable deeds to be done by their executors for the health of their souls*; notwithstanding such *trust* and confidence, some have refused to intermeddle, &c., by reason whereof, as well the debts of such testators have rested unpaid and satisfied, to the great damage and peril of the soul of such testators, and to the great hindrance and undoing of their creditors, as also legacies and bequests made by the testator to his wife and children, and for *other charitable deeds to be done for the health of the soul of the testator*, as well unto the extreme misery of his wife and children, as also unto the let of performance of *other charitable deeds for the health of the soul of said testator, to the displeasure of*

Almighty God." Provision is then made for cases of this kind in the future. Some of these uses, such as for the payment of debts, had, as all will admit, long been enforced in equity. But the same doubt in this case of refusal to act hangs over all alike. This statute is conceived in the spirit of the time. The principal reason for the amendment of the law grew out of the danger that the testator's soul might be lost by a neglect to fulfil his directions. By a singular *non sequitur*, the misconduct of the living occasioned the loss of the soul of the deceased. While such a feeling animated the Parliament, can it be believed that charitable uses remained for centuries unenforced?

This statute is of great importance, as disclosing the fact that "charitable deeds for the wealth of the soul" already existed as a *class* more than fifty years before the statute of Elizabeth, and consequently could not have been introduced by that statute. No one who has studied the Year Books or the reports "of the Commissioners of Charities," can entertain any doubt that those words indicate what is now understood by the term "charitable uses." This statement is confirmed by the statute of Henry V., which declares hospitals to have been founded in aid of the souls of the founders.

But charitable gifts not only were recognised, but could be made to unincorporated associations or persons. These had become exceedingly common. A certain class of them had become obnoxious—those which in evasion of the statutes of mortmain, had been created for perpetual obits, or continued service of a priest forever. These are stated in the preamble to the 23 H. VIII. c. 10, to have been made to the use of unincorporated persons, to receive the rents and profits of land, so that the king was as much prejudiced as in case where *lands were aliened in mortmain*. This is the strongest possible admission that they were treated by the court as valid. Says Lord Bacon: "By this statute a further remedy was given in a case like unto the case of mortmain, for in the statute 15 R. II., remedy was given where the use came *ad manum mortuam*, which was when it came to some corporation; now, when uses were limited to a thing apt or

worthy, and not to a person or body, as to a corporation of a church or chaplain, or obit, but not incorporate as to priests, or to such guilds or fraternities as are only in reputation, and not incorporate, the case was omitted, which, by the statute was remedied," &c. The statute then admits the original validity of such uses by enacting that henceforth they shall be void, except for twenty years. This provision as to their validity for twenty years is not a *new* rule, but only permissive as at common law.¹

The object of this law plainly was to suppress this class of superstitious uses only. Mr. Froude, in his accurate history, expressly confines its effect to that class of cases.² So Sir William Grant limits its effect to estates of land given to churches and chapels.³ It is difficult to conceive, after the strong language of the Parliament, two years before, that it was intended to impair the effect of the testator's "charitable deeds." It is worthy of observation that the words of the first statute are entirely avoided in the second. We have, then, within this brief period of two years, as many distinct expressions from Parliament upon this subject. Charitable uses are recognised and enforced. They ought to be sustained to unincorporated persons, though they create a *perpetuity*. True, there is the *same inconvenience* as in case of mortmain. Some of them, such as obits, should be limited to twenty years, because they are strictly for individual advantage, without any corresponding general good. The others should continue as permanent foundations. The line is now for the first time drawn—a line hereafter to become sharp and decisive—between superstitious uses and true charities. Ultimately, the former, which are now restricted to twenty years, will be suppressed. But the legislature and the courts will continue to recognise "*Godly uses*." The judges will distinguish in the same instrument between the two, separating the tares from the wheat. It was held in Cro. Eliz. 288, that the statute did not affect schools or alms-houses.

¹ Boyle on Charities, 254; 2 B. & A. 102.

² Froude's History of the Reign of Henry VIII., vol. 1, p. 352.

³ Cary vs. Abbott, 7 Ves. 495; 12 Mod. 31; Boyle on Charities, 243.

It would then appear, that before the statute of uses, and while wills of land were "customary," a direct devise to an unincorporated body was void *at law*. Consequently, no such disposition could be made under a *customary will*, unless a trust was created. A devise could be made of a use to an unincorporated association, either by a will made, declaring the uses of a feoffment, or by a customary will if a trustee was interposed.

The effect of the statute of uses and of the statute of wills must now be noticed. The object of the statute of uses was to declare that the owner of the use should have a legal estate of the like quality in the land which he had previously had in the use. The right to create a use was not abrogated, but simply the *effect* of the transaction was declared. The courts were soon called upon to construe this statute. They held, by a process of refined reasoning, that the statute did not extend to all uses; but that certain conditions were necessary to the transfer of the legal estate. Consequently, as *every use can be created since the statute which could be created before*, and some uses cannot be turned into legal estates, it follows irresistibly that all such as cannot be converted under the statute, must, as before, be enforced in Chancery. The tests to determine whether a use could be made a legal estate, were,—First, that there must be some person seised to the use; Second, that there must be a *cestui que use* in existence, or *in esse*; Third, that there must be a use in existence or *in esse*. In examining the second condition, Mr. Cruise says accurately: "The second circumstance necessary to the execution of a use by this statute, is that there must be a *cestui que use* in esse. If, therefore, a use be limited to a person not in esse, or to a person *uncertain*, the statute can have no operation." The word "uncertain" as contrasted with a person not in existence, must refer to unascertained persons, as, for example, a gift to trustees for the use "of the poor." The language of Mr. Cruise is very guarded. He admits that the use is valid, but that it remains unaffected by the statute.¹ So Lord Bacon, in his reading on the Statute of Uses, says: "The statute excludes dead uses, which are not to bodies

¹ Cruise's Digest, Tit. 11, Ch. 3, § 7-29.

lively and natural, *as the building of a church or the making of a bridge. It is ever coupled with body politic.*¹ And again, "when-ever the statute speaketh of the feoffee it addeth person; when it speaketh of the cestui que use, it addeth *person or body politic,*" so that every use to an unincorporated body would remain unexecuted by the statute and a trust. Besides, upon the theory of active trusts, which were never executed, the feoffees to charities would usually have duties to perform inconsistent with the execu-tion of the trust. The income would often be employed so as to create a *foundation*, and the feoffees must hold the legal estate in order to pay over the rents to the persons entitled.²

It is evident, however, that the practice of creating feoffees to uses for the purpose of making a will, could no longer be resorted to. The legal title would, as soon as the feoffment was made, revert to the owner. For the five years intervening between the passage of the statute of uses and the enactment of the statute of wills, no charitable foundation in land could be created by will, except where there was a custom to make wills. As soon as the statute of wills was passed, charities could again be established. It is entirely clear that if a competent devisee was selected, he could take the legal title by the will, and become a trustee for an indefinite body circumscribed by a given locality, as the poor of the parish. As already remarked, the use would not be executed, and would constitute a trust. This is distinctly stated by Mr. Spence, who is no friend to the enlarged jurisdiction of the Court of Chancery upon this subject.³ The indefinite body, through one or more of its members, could call the feoffees to account, and establish the trust. Upon similar principles a trust of this kind could be created by act *inter vivos*.

This point is so vital in the consideration of this topic, that authorities should be cited. The first which will be noticed are those derived from the Record Commission.⁴ All the authorities

¹ Bacon's Works, Montague's edition, 18 Vol. 340. Pickering, London.

² See the case of *Arnold vs. Barker*, cited *infra*.

³ Spence Eq. Jurisd., vol. i., 589, citing various authorities.

⁴ This commission was, as is well known, created for the purpose of preserving and arranging the public records of England.

found in the volumes of the Commissioners have been collected in a note to *Vidal vs. Girard*, 2 How. U. S., 155. The great result derived from all these cases is, that a charitable use could be given, after the statute of uses, to a definite person, for an indefinite body of persons residing within a given locality; that the use was not executed by the statute, but was enforceable in chancery; that the *indefinite body* could appear by one or more of their number, and could ask the interposition of the court to *establish the trust against the holders of the legal title*. Thus, in several cases, one or more of the inhabitants of a *parish* filed a bill against feoffees usually to establish a trust to real estate. Now it is perfectly well settled that a "parish" out of the city of London was *not* a corporation.¹ It is said in Moore's Reading upon the Statute of Charitable Uses, that a deed to a parish for a charitable use was void² (at law.) A devise to churchwardens is also void, (at law.) Though they were a corporation, it was only for special purposes.³ The bill was usually brought by a *single person*, *in behalf of himself and the co-inhabitants of the parish*.⁴ In some cases the application was to appoint new trustees; in others, to *establish* a charitable donation, conveyed to feoffees in trust for the parish,⁵ or for the support of a charity,⁶ (in the year 1573.) Sometimes the suit was instituted by churchwardens on behalf of the parish. In one case, certain houses in Oxford had been conveyed to trustees, to repair the church and to relieve the poor, and the feoffees refused to account.⁷ In another case, the suit is to *establish* a charitable donation.⁸ In some instances, *the poor*

¹ Bacon's Reading on the Statute of Uses; Year Book, 12 H. VII., pp. 27, 28, 29.

² Duke on Charitable Uses, p. 139.

³ Duke, 63; p. 82, case 34; Year Book, 12 H. VII., pp. 27, 28, 29.

⁴ Perot vs. Cruise, 1 Calendars in Chancery, p. 159, case 28; Rawley vs. Lewis, 3 do., p. 319, case 51, addressed to Sir N. Bacon.

⁵ Blackwell vs. Spiry, 1 Id., p. 276, case 32.

⁶ Fox vs. Benbe, 2 Id., p. 128, case 55; Whitehurst vs. Warner, 3 Id., p. 291. case 51.

⁷ Smith vs. Smith, 3 Cal. in Chan. 108, case 27.

⁸ Newton vs. Dane, 2 Id. 228, case 65.

themselves were joined as complainants. Thus a messuage and land, called Hookes, in the parish of Writtle, in the year 1500, was given by Thomas Hawkins in trust *for the poor of said parish*. The suit was instituted for the continuance of the charity, against the surviving feoffees, by the vicar, churchwardens and the *poor of Writtle*. The suit was commenced in the year 1596, before the statutes of Elizabeth.¹

It is believed that much of the force of these authorities has been lost in common estimation, from the fact that the distinction between the parishes in and out of London has not been attended to. Every case in which the question arose both before and after the statutes of Elizabeth, holds that a conveyance of land to a parish out of London was void at law. The form in which these suits were brought plainly shows that it was not a corporation.

Without accumulating authorities from this source, enough have been cited to show the judicial recognition of the existence of charitable trusts where the objects were, though indefinite, embraced within some circumscribed territorial division, or consisted of an unincorporated body. The gift in these cases was strictly confined to the poor of the parish.² Special favor was granted to suits for the benefit of the poor. Thus in one case, where the claim was under forty shillings, it appeared that it was "for the benefit of the poor of Drayton," and was consequently not dismissed, though in other cases the suit would not have been heard. This decision was made in the 21st Elizabeth.³

Many additional cases, from other sources, might be cited. Objections might be raised to some, that it was not clear whether they were not under the statutes of Elizabeth, or decided by reason of powers conferred by those acts. Two or three authorities will be adduced, of a satisfactory nature, to which no such objections can apply. The first is the case of *Arnold vs. Barker*, decided by the *Master of the Rolls*, in the 7 Jas. I., (1607.) It is well understood that the Master of the Rolls would never act under these statutes. He would not even hear any appeal from the commis-

¹ 8 Cal. in Chan. 269, case 56.

² Duke, 158.

³ Cary's Reports, p. 147.

sioners, because he was not named in the acts.¹ This case occurring within half a dozen years after the 43 Elizabeth, must have proceeded then upon the inherent jurisdiction of the court. It cannot be claimed that he received a delegated power from the Chancellor, because, as Lord Hardwicke has conclusively shown, he had an original jurisdiction.² The case in question was brought before the Master of the Rolls by original bill. The land had been given to feoffees to hold to the relief of the poor people of the parish of St. Bennett. The decree *established the charity*, and directed *that when four of the feoffees were dead, the survivors should convey to four other feoffees, to be selected by the Mayor, &c.*, and so on, *toties quoties*. This case is remarkable, as showing that *foundations* might be created of a perpetual nature, and were not obnoxious to the rules of law respecting "remote-ness" or so called perpetuities. This case alone would seem to be enough to prove that chancery had an ample original jurisdiction over the subject.³ Symonds's case may be noticed. One Symonds, an Alderman of Winchester bargained and sold certain land to Sir Thomas Fleming upon confidence to perform a charitable use, which the said Symonds declared by his last will that Sir Thomas Fleming should perform. The bargain was never enrolled, yet the Lord Chancellor decreed that the heir should sell the land, to be disposed according to the limitation of the use. This decree was made upon ordinary and judicial equity in the chancery, in the 24th year of the reign of Queen Elizabeth, fifteen years before the statutes.⁴ Lord St. Leonards has shown that the word "sold," as applicable to the conveyance made by Symonds, means a bargain and sale, which always *needs a consideration*. This case then decides that a Court of Chancery enforced a charity upon the ground that it was not a mere bounty, but was a sufficient consideration to sustain a bargain and sale, and that *the heir could be*

¹ Boyle on Charities, p. 17; Rockley *vs.* Kelly, Precedents in Chan. 111.

² Discourse on the Judicial Authority belonging to the Master of the Rolls, *passim*.

³ 27th Volume of the Reports of the Commissioners of Charities, p. 648.

⁴ Moore's Reading, Duke, 162.

treated in equity as a trustee for the charity. Upon the conclusion derived from this case alone, that great master of real property law, Lord St. Leonards, came to the conclusion that charities could be forced before the statutes of Elizabeth.¹

Still further, there is reason to believe that the *cy près* power of the court was exercised at an early day. This would naturally be anticipated from the influence of the principles of the Roman law upon the rules of Chancery. The bishops, who for many years sat in the Court of Chancery, were entirely familiar with that class of principles. There was every reason to apply them as the same motive, "to benefit the soul," was equally operative under both systems of jurisprudence. A conveyance of lands had been made to a rector and churchwardens, on condition to appropriate a fixed sum to say masses for the soul of the dead. After the statute of Chantries was passed, forfeiting to the crown lands given to superstitious uses, a grant was obtained from the King to one Payne, whose grantee brought his action in the Common Pleas against the rector, &c. This proceeding failed, because as the superstitious uses had not been carried out for six years, the case came within the saving of the statute. The grantee then commenced a suit in Chancery, in 22 and 23 Elizabeth. The rector, &c., showed that they had appropriated all the surplus over the fixed sum, to *good and laudable uses* for the support of the poor, &c. The court established the title of the rector, &c., decreeing a certain rent-charge to the grantee of the King. The case shows that the Court of Chancery was a proper tribunal to enforce the use. The King manifestly only succeeded to the right of the *cestui que use*. The theory that all surplus income should be devoted to charity in accordance with the modern *cy près* doctrine, seems to be regarded.² Nothing appears to have gone to the heirs.³

¹ Drury & Warren, 309.

² 8 Coke, 130; Boyle, pp. 180-191.

³ Barton's Will, made in 1434. 6th Report of Commissioners of Charities, p. 197. S. C. endowed Charities of the City of London; reprinted at large from the reports of the Commissioners concerning charities, p. 161-2. More than two hundred and fifty charities in London alone, are described in this volume as having been endowed before 1600. Most of them still exist.

The more difficult question still remains, whether, if property was left, after the statute of uses, to an unincorporated body, without the intervention of a trustee, the charity could be upheld? It would seem, however, that if the principle of Symonds's case was correct, a testator might be regarded as devoting his land to the payment of a meritorious claim, and that the conscience of the heir should be so far affected as to fasten the trust upon him. It certainly seems a very narrow distinction, that the form of making a trustee should be vital to the existence of a trust. The only element which seems to be necessary, is that of consideration, and then the maxim becomes applicable, that a trust shall never fail for want of a trustee. Land directed to be sold for the benefit of children was decreed to be sold, though no one was appointed by the testator to make the sale.¹ Heirs are not unfrequently charged with trusts in equity, growing out of directions to pay debts, &c., made in the wills of their ancestors.² Lord Hardwicke decreed in a case of charities, where no feoffees were created, that the heir at law should be regarded as trustee. He applied as against the heir the *cy près* doctrine in the same manner as he would have done in the case of feoffees.³

It still remains to examine the statutes of Elizabeth, the subject of Informations in Chancery, and the extent to which the court enforced jurisdiction in gifts of personal property.

T. W. D.

(*To be Continued.*)

¹ Tothill's Rep. 121, 39 Eliz.

² Lewin on Trusts, 77.

³ Attorney General *vs.* Johnson; Ambler R. 190.